

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GARY WAYNE SCHWIETER,

Petitioner,

vs.

MICHAEL BUDGE, *et al.*,

Respondents.

3:07-cv-0092-LRH-VPC

ORDER

This is an action on a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. By Order filed March 7, 2007, this Court granted petitioner's application to proceed *in forma pauperis*, directed the petition to be served on respondents, and denied petitioner's motion for the appointment of counsel. (Docket #3).

I. Motion for Reconsideration (Docket #6)

On March 16, 2007, petitioner filed a motion for reconsideration of this Court's Order of March 7, 2007. Specifically, petitioner asks this Court to reconsider its denial of petitioner's motion for the appointment of counsel. (Docket #6). On April 19, 2007, petitioner filed a second motion for the appointment counsel, which is an exact duplicate of his first motion, except a change of the signature dates. (Docket #8).

Where a ruling has resulted in final judgment or order, a motion for reconsideration may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

1 Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or order for the
2 following reasons:

3 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
4 discovered evidence which by due diligence could not have been
5 discovered in time to move for a new trial under Rule 59(b); (3) fraud
6 (whether heretofore denominated intrinsic or extrinsic),
7 misrepresentation, or other misconduct of an adverse party; (4) the
8 judgment is void; (5) the judgment has been satisfied, released, or
discharged, or a prior judgment upon which it is based has been reversed
or otherwise vacated, or it is no longer equitable that the judgment should
have prospective application; or (6) any other reason justifying relief
from the operation of the judgment.

9 Motions to reconsider are generally left to the discretion of the trial court. *See Combs v. Nick Garin*
10 *Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a motion to reconsider, a party
11 must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior
12 decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986),
13 *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9th Cir. 1987). Rule 59(e) of
14 the Federal Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be
15 filed no later than 10 days after entry of the judgment." Furthermore, a motion under Fed. R. Civ. P.
16 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented
17 with newly discovered evidence, committed clear error, or if there is an intervening change in the
18 controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001), *quoting McDowell v. Calderon*,
19 197 F.3d 1253, 1255 (9th Cir. 1999).

20 In the instant case, petitioner's motion for reconsideration does not set forth facts or law to
21 induce this Court to reverse its prior ruling denying petitioner's motion for the appointment of counsel.
22 Petitioner has not presented newly discovered evidence, has not demonstrated that this Court committed
23 clear error, and has not shown (and indeed cannot show) that there has been an intervening change in
24 the law. Petitioner merely asks the Court to appoint counsel, and submits the same motion for
25 appointment of counsel, verbatim, as his prior motion, which is discussed below. Petitioner's motion
26 for reconsideration is denied.

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1 **IT IS FURTHER ORDERED** that respondents' motion for an enlargement of time (Docket
2 #10) is **GRANTED**, *nunc pro tunc*, such that the motion to dismiss (Docket #11) is deemed timely filed.

3 Dated this 10th day of October, 2007.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE